TEOK KIEN SENG, RE: EX P; SAW SIEW CHEW

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[BANKRUPTCY NO: 29-650-1990]
30 SEPTEMBER 1991

BANKRUPTCY: *Application to set aside petition - Whether presence of judgment creditor essential at date of hearing - Representation by solicitors - Effect of - Charging order over shares of judgment debtor in various companies - Allegation that unaware of summary judgment - Credibility - Bankruptcy Act 1967, s. 5(2) - Bankruptcy Rules 1969, rr. 21, 65, 120, 122, 276.*

The petitioning creditor S, obtained summary judgment under O. 26A of the Subordinate Courts Rules against the judgment debtor T on 8 August 1989. T was the sole proprietor of KHSEC Co., managing director of BC and also held 40,000 shares in KHST. T did not appeal against the summary judgment.

On 18 May 1990 S issued a bankruptcy notice which was served by substituted service. On 1 June 1990 S obtained a charging order on T's shares in B.C. and on 30 August 1990 a similar order was made against KHST. On 8 January 1991 solicitors of S took out a creditor's petition and served it personally on T. On the day of the hearing of the creditor's petition, S was not present. The hearing of the petition was fixed on 10 May 1991. T filed an affidavit one day before the hearing, seeking dismissal of the notice on the same grounds as the earlier affidavit which was dismissed. T's Counsel argued that unless S was personally present, the Court could not make the orders as the presence of her solicitor was insufficient.

The issue was whether the 2 charging orders obtained by S resulted in her holding securities belonging to T and whether therefore she should give them up under s. 5(2) of the Bankruptcy Act 1967 (the Act).

Held:

[1] Rules 120 and 122 of the Bankruptcy Rules 1969 (the Rules) which require the petitioning creditor to be present, must be taken to refer to a situation where he is acting in person or where there is serious challenge to the existence of the act of bankruptcy. Although r. 276 of the Rules excludes the RHC 1980 in bankruptcy matters, the Rules make it clear that parties may be represented by a solicitor. Further, where the creditor's petition is founded on a judgment debt, the Court can take judicial notice of its own judgments.

[2] A charging order is not a security and it does not operate as a stay of execution. A debtor may successfully apply to stay a bankruptcy notice only if the debtor can show that the charging order has made it not just difficult, but impossible to pay the amount claimed. T gave no evidence whatsoever on the effect of the charging orders. If they had yielded any benefit to S, he would undoubtedly have said so. Therefore this objection fails.

[3] T's allegation that he only knew of the summary judgment against him in 1990 was devoid of merit and totally lacking in credibility as there was evidence that his lawyer during the civil suit had informed him of this. T however did not appeal against that summary judgment. In view of his position in the relevant companies as a substantial shareholder he must have known of the charging orders in June and August 1990. He did not apply then. In November 1990 when he affirmed his affidavit to set aside the bankruptcy notice, he said nothing about being unaware of the judgment.

[Application to set aside bankruptcy petition dismissed with costs; Receiving and adjudication orders made against bankrupt with costs.]

Cases referred to:
Bracia Czeczowiczka v. Otts Markus [1963] 1 ALL ER 944 ***(cit)***
Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee [1988] 1 CLJ (Rep) 277 ***(cit)***

Legislation referred to:
Bankruptcy Act 1967, s. 5(2)
Bankruptcy Rules 1969, rr. 21, 65, 120, 122, 276
Legal Profession Act 1976, s. 36
Subordinate Courts Rules 1980, O. 26A

Other sources referred to:
Atkin's Encyclopedia of Court Form, Vol. 7, 2nd Edn.,
Halsbury's Laws of England, 4th Edn.,
Williams and Muir Hunter on Bankruptcy, 19th Edn.,

For the judgment debtor - Joseph Loo; M/s. Shinmun & Associates
For the judgment creditor - Wu Tern Yue; M/s. K.C. Yap Kamaluddin & Partners

JUDGMENT

Mahadev Shankar J:

This is a very belated application to set aside a bankruptcy petition. I dismissed it with costs. I then made a receiving and adjudication order as prayed for with costs.

The petitioning creditor (Saw) obtained summary judgment against the judgment debtor (Teok) in the Klang Sessions Court on 8 August 1989. This was a summary judgment under O. 26A of the Subordinate Court Rules. Teok was legally represented by a Mr. Krishnan. A defence had been filed. Judgment was only entered after hearing both sides.

It is an evidence that Teok was told by his solicitor about this judgment. He did not appeal.

Saw's solicitors attempted to enforce the judgment. Teok is the sole proprietor of Kien Hoe Seng Engineering Construction Company. It is in this capacity that judgment has been obtained against him. He is also managing director of Builtrite Construction Sdn. Bhd. (B.C.) in which he holds 125,000 shares. He also holds 40,000 shares in Kien Hoe Seng Trading Co. Sdn. Bhd. (KHST).

On 18 May 1990 Saw issued a bankruptcy notice. It could not be personally served despite several attempts. So it was served by substituted service on or about 7 November 1990. On 12 November 1990 Teok by a new firm of solicitors Anthony Fernandez & Partners filed an affidavit in opposition to the notice. I shall revert to this shortly.

On 1 June 1990 Saw obtained a charging order on Teok's shares in B.C. On 30 August 1990 Saw obtained an order against Teok's shares in KHST which crystallised as charging order on 14 December 1990 as cause to the contrary was not shown. Teok is a director of these companies. There is no evidence that Saw got anything whatsoever out of these charging orders.

Teok's solicitors did not serve the affidavit in opposition to the bankruptcy notice as required by the Bankruptcy Rules or at all. Saw's solicitors took out a creditor's petition on 8 January 1991 and had it served personally on Teok. The petition was fixed for hearing on 22 March 1991. Notwithstanding a reminder on 29 January 1991 to Teok's solicitors as to non-service of the affidavit it was still not served. Neither Teok nor his solicitors appeared on 22 March

to support the application which was consequently dismissed. Saw's solicitors were directed to proceed with the bankruptcy petition and a new date was fixed on 10 May 1991.

The day before the hearing Teok, now acting in person, filed an affidavit intituled as being in opposition to the petition. The wording strongly indicates it was prepared by somebody illegitimately masquerading as a person with legal expertise and possibly in contravention of s. 36 of the Legal Profession Act. Despite the hearing, the body of the affidavit prays for the Court to set aside the bankruptcy notice on the same grounds as the earlier affidavit, which had been dismissed.

For technical reasons the petition could not be proceeded with and it was adjourned to 4 September 1991.

True to form Teok once again caused another objection to be filed within a few days of the hearing, this time through a new firm of solicitors.

The objections now taken to the Court making the orders sought on the petitions were as follows.

Teok was not in Court. His Counsel submitted however that unless Saw was personally present the Court could not make the orders. The presence of her solicitors was not enough. He cited Vol. 3 *Halsbury's Laws of England* 4th edn., para. 341. The practice of our Courts has always been to allow judgement creditors to be legally represented. English authorities are at best persuasive and their citation on such mundane matters must be deprecated. However it will be observed that *Atkin's Encyclopedia of Court Form* Vol. 7 (Second Edn.,) at p. 98, para. 35 specifically allows Counsel and solicitors to appear at the hearing of a bankruptcy petition.

The bankruptcy rules (hereafter referred to as the Rules) rr. 120 and 122 should not be read as requiring otherwise. I agree with the official Assignee that these Rules - which require the petitioning creditor to be present must be taken to refer to a situation where he is acting in person or where there is serious challenge to the existence of the act of bankruptcy. Although r. 276 excludes the Rules of the High Court in bankruptcy matters, the Bankruptcy Rules make it clear that parties may be represented by a solicitor (See rr. 21 and 65). Besides where the creditor's petition is founded on a judgment debt the Court can take judicial noticeof its own judgments.

The only point of substance taken was that the two charging orders obtained by Saw resulted in her holding securities belonging to Teok. Consequently it was submitted that she should give them up as provided by s. 5(2) of the Act. Since the face value of the shares exceeded the debt it was contended that Saw had not satisfied the Court that the debt was in fact due. I hold that a charging order is not a security and it does not operate as a stay of execution. A debtor may successfully apply to stay a bankruptcy notice only if the debtor can show that the charging order has made it, not just difficult, but impossible to pay the amount claimed. The onus of proof on this point is on the debtor. See *Williams and Muir Hunter on Bankruptcy* (19th Edn.,) pp. 32, 33 and the case of *Bracia Czeczowiczka v. Otts Markus* [1963] 1 ALL ER 944 at 949, 950. See also *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 CLJ (Rep) 277.

Teok gave no evidence whatsoever on the result of the charging orders. If they had yielded any benefit to Saw, he would undoubtedly have said so. Therefore this objection fails.

The next point made for Teok was that he only came to know of the judgment against him in 1990 when he applied to set aside the bankruptcy notice. He was allegedly unaware that his second lawyer had failed to attend the hearing on 22 March 1991. After the creditor's petition was issued he appointed Mr. Joseph Loo's firm. Mr. Loo said that as he had filed an application in the original suit for leave to appeal out of time against the summary judgment this Court should adjourn this petition until his application for leave to appeal out of time had been heard by the Sessions Court and disposed of.

I considered this point devoid of merit because *inter alia* it was totally lacking in credibility. Teok knew that the trial of civil suit had been concluded against him, because after the trial Krishna told him so (See para. 9-12 of his Police Report made on 29th August 1991). It was open to him to appeal then. He did not but preferred to negotiate. In view of his position in the relevant companies as a substantial shareholder he must have known of the charging orders in June and August 1990. In November 1990 when he affirmed his affidavit to set aside the bankruptcy notice, he said nothing about being unaware of the judgment. He claimed to have instructed his second solicitors to apply to set aside the judgment. But no such application was ever filed.

Apart from the various other infirmities in Teok's case, Mr. Wu pointed out that as late as 9 May 1991 Teok had come to them and proposed settlement.

With this kind of a history behind Teok it is a matter of regret to this Court that Counsel could be persuaded to make yet another attempt to frustrate the judgment creditor from obtaining the order she sought, to which in my view she was justly entitled.

I now order that the costs of and incidental to this judgment also be taxed and recovered from the estate of the bankrupt.

Also found at [1991] 3 CLJ 2599